

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

vs. NO. 11-0599 (Randolph County 98-F-7 & 99-F-5)

**KENNETH LENHART,
Defendant Below, Petitioner**

FILED
February 10, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The Circuit Court of Randolph County sentenced Kenneth Lenhart (Lenhart) to consecutive terms of imprisonment and refused to give him credit for the time served in jail prior to his guilty plea. The State confessed error.

Having considered the parties' briefs and record on appeal, this Court concludes that the circuit court erred in refusing to grant Lenhart credit for time served prior to his conviction. A memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellant Procedure because there are no disputed questions of law or fact.

Lenhart was arrested on charges of first degree murder and aggravated robbery in Randolph County on November 29, 1997, and incarcerated without bail while awaiting trial. Lenhart contends he remained incarcerated, prior to his conviction, from November 29, 1997 through February 25, 1999, for a total of four hundred and fifty (450) days. On February 23, 1999, Lenhart entered a guilty plea to second degree murder and aggravated robbery due to involvement of a firearm. On February 25, 1999, Lenhart was sentenced to a determinate term of forty (40) years for the second degree murder charge and twenty-five (25) years on the aggravated robbery charge. The sentencing order did not grant Lenhart credit for time in jail served prior to his conviction.

On August 30, 2010, Lenhart filed a "Motion for Correction of Sentence." The circuit court denied Lenhart's motion. The circuit court found that Lenhart was in jail awaiting trial for first degree murder, a non-bailable offense and that the court was not obligated to credit Lenhart for time served.

Lenhart raises two points of error in his petition for appeal. First, Lenhart argues that the circuit court abused its discretion by denying him pre-conviction credit for time served, thereby depriving him of his constitutional right to due process and equal protection of the

law. Second, Lenhart argues that denying his credit for time served allows his sentence to exceed the maximum sentence for his crimes in violation of Article III, § 5 of the West Virginia Constitution and the Eighth Amendment of the U.S. Constitution.

After Lenhart was sentenced, he filed a “Motion for Correction of Sentence” asserting that he was entitled to credit for the four hundred and fifty (450) days he served in jail prior to entering the guilty plea for his crimes. The circuit court denied Lenhart’s motion, holding that “the principles outlined in West Virginia Code § 61-11-24 and *State v. McClain* do not apply. The court held it was not obligated to credit Lenhart for any pre-conviction time served.”

West Virginia Code § 61-11-24 [1923] provides that:

Whenever any person is convicted of an offense in a court of this State having jurisdiction thereof, and sentenced to confinement in jail or the penitentiary of this State, or by a justice of the peace having jurisdiction of the offense, such person may, in the discretion of the court or justice, be given credit on any sentence imposed by such court or justice for the term of confinement spent in jail awaiting such trial and conviction.

West Virginia Code § 62-1C-1(a) [1983] provides that:

A person arrested for an offense not punishable by life imprisonment shall be admitted to bail by the court or magistrate. A person arrested for an offense punishable by life imprisonment may, in the discretion of the court that will have jurisdiction to try the offense, be admitted to bail.

In Syllabus Point 6 of *State v. McClain*, 211 W.Va. 61, 561 S.E.2d 783 (2002), this Court held that:

The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is

bailable.

A plain reading of West Virginia Code § 61-1C-1(a) makes all offenses “bailable.” West Virginia Code § 61-1C-1(a) clearly indicates that even those offenses punishable by life imprisonment are eligible for bail at the discretion of the court. Therefore, the charge against Lenhart of first degree murder was “bailable” at the discretion of the circuit court and the holding of *McClain* applies to his case. In accordance with *McClain*, Lenhart’s time spent in jail before conviction must be credited against all terms of incarceration to a correctional facility imposed in his criminal case. Therefore, consistent with the holding of *McClain*, Lenhart must be granted credit for time served prior to his conviction..

We, therefore, ORDER that this case be remanded to the Circuit Court of Randolph County for entry of an order granting Lenhart credit for the time he served in jail prior to conviction.

REMANDED WITH DIRECTIONS.

ISSUED: February 10, 2012

CONCURRED IN BY:

**Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh**